

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

September 5, 1996

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

NOTICE

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No. 96-0193

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

JACK REBER, AND SUZANNE REBER,

Plaintiffs-Appellants,

v.

WISCONSIN POWER & LIGHT,

Defendant-Respondent.

APPEAL from a judgment of the circuit court for Wood County:
VIRGINIA WOLFE, Judge. *Reversed.*

Before Eich, C.J., Vergeront and Roggensack, JJ.

VERGERONT, J. Susan and Jack Reber appeal from the trial court's judgment granting a directed verdict in favor of Wisconsin Power and Light Company. The Rebers' complaint alleged that WP&L's negligence in the construction, operation and maintenance of its electrical distribution system exposed their dairy herd to harmful levels of stray voltage from at least the early 1980's to 1988 and that WP&L's conduct constituted a nuisance. The

Rebers sought damages for loss of profitability in their farming operation and for annoyance and inconvenience. On appeal, the Rebers contend that the trial court erred in excluding the testimony of their expert, Alfred Szews, Ph.D., with respect to the levels of stray voltage on the Rebers' farm prior to 1985 and erred in striking their claim for nuisance before trial. We conclude that the trial court erroneously exercised its discretion in excluding the expert testimony and we therefore reverse. We also conclude that, in light of *Vogel v. Grant-LaFayette Electric Cooperative*, 201 Wis.2d 416, 548 N.W.2d 829 (1996), the claim for nuisance should be reinstated.

In late 1978, the Rebers decided to reestablish a dairy herd on their farm. Jack Reber testified to problems they had with the cows' behavior and milk production from that time for about a ten-year period and their unsuccessful efforts to identify and eliminate the cause of these problems. In late 1987, Jack Reber learned from a neighbor about stray voltage and the effect it could have on cows, and he asked WP&L to check his farm for stray voltage.¹ After various testings by WP&L and negotiations between WP&L and the Rebers, WP&L installed an isolator on the transformer pole at the Rebers' farm. The purpose of the isolator was to remove the connection between the primary neutral and the secondary neutral, in an effort to reduce the stray voltage contributed by WP&L's system.

¹ Electrical energy generated at the power company travels through transmission lines to a substation, which distributes the electrical energy in a particular neighborhood or area. The power company's distribution lines (the primary system) consists of energized wires which carry power to the customer and a neutral wire, which provides a path for a portion of the return current back to the substation. (A portion of the return current can also travel back to the substation through the earth.) The farm's wiring system (the secondary system) also consists of energized wires and a neutral wire. The neutral wires in both the primary and secondary systems are connected to metal grounding rods driven into the earth. The primary neutral wire and the secondary neutral wire are typically connected, so that each system can benefit from the other system's grounding.

For safety reasons, the neutral wire in a typical farm's wiring system is connected to metal work in the barn. Because of that attachment, the neutral wire, which invariably carries some electrical current, will transfer some of that current to the metal objects to which they are connected. "Stray voltage," also called "cow contact voltage," occurs when a cow that contacts metal objects in the barn provides a path for the electrical current from the metal object to the earth. The amount of stray voltage may be affected both by the power company's distribution system and the farm's wiring system.

During the winter and spring of 1988, WP&L installed copper grounding wire along a one-quarter mile of its distribution system just north of the Reber farm and replaced various hardware on the system, such as poles and transformers, in the area of the Reber farm. According to Reber's testimony and exhibits he introduced, milk production and cow behavior improved after these changes were made by WP&L.

Professor Szews, an electrical engineer, performed electrical testing at the Reber farm in May 1994, both in the isolated and de-isolated condition and inspected the line from the Rudolph substation to the Reber farm as well as the farm's electrical system. Professor Szews testified that his opinions and conclusions were based on: his tests and observations; the report and tests conducted by a master electrician on the Reber farm in 1990; the continuous voltage charts taken by WP&L at the Reber farm in 1987-88; published studies; his own experience; a chronology of events prepared by the Rebers; WP&L's report as a result of its first investigation at the farm in late 1987 and early 1988; documents produced by WP&L during discovery, including its distribution maps and service records; a report of the Wisconsin Stray Voltage Analysis Team at the Brommelkamp farm which is on the same distribution feeder as the Reber farm; and numerous depositions taken in this case of witnesses for both parties.

Professor Szews testified that substantially all of the cow contact voltage and currents at the Reber farm were from the utility system, not the farm's electrical system, and he explained how he arrived at this conclusion. Based on the results of testing conducted on the Reber farm in 1990, with the farm de-isolated and actual milking loads running, Professor Szews testified that currents accessing cows were above the level of concern established by the Public Service Commission, that is, the level above which corrective action should be taken.

When Professor Szews was asked his opinion on whether levels of stray voltage accessed the Reber farm in amounts sufficient to adversely affect the productivity of the herd from 1978 to 1988, WP&L objected based on lack of foundation. WP&L's argument was that since no testing was conducted until late 1987, there was no foundation for any testimony about stray voltage prior to that date. The trial court did not agree with WP&L that the lack of testing prior to 1987 precluded Professor Szews from testifying about the probable

levels of stray voltage and the cause prior to that date. However, the court ruled that because the Rudolph substation did not begin serving the Reber farm in 1985, Professor Szews did not have an adequate foundation to testify concerning the electrical system prior to 1985 when another substation, the Vesper substation, served the farm.

The court permitted voir dire of Professor Szews to allow the Rebers to lay a foundation for his testimony prior to 1985. At the end of the voir dire, the court repeated its ruling that there was a lack of foundation for testimony on the electrical system prior to 1985.

As a result of the court's ruling, Professor Szews's opinions on WP&L's negligence in failing to provide reasonably adequate services to the Reber farm was limited to the years 1985-1988. The Rebers' experts on damages had been prepared to testify to the effects on the herd for the full period of exposure from 1978-1988 and were not prepared to testify to damages resulting from exposure only during 1985-1988.² Therefore, the Rebers' counsel made an offer of proof on the rest of their case. The trial court granted WP&L's motion for a directed verdict on the ground that the Rebers had not met their burden of proof to support a jury verdict with respect to damages occurring during and after 1985.

On appeal, the Rebers argue that, in excluding Professor Szews's testimony for the period prior to 1985, the trial court went beyond the trial court's proper role and, in effect, ruled on the reliability of Professor Szews's testimony. WP&L responds that trial courts have wide discretion to limit expert opinion and may do so when there is a lack of foundation. We agree with the Rebers that the trial court's basis for excluding Professor Szews's testimony was its evaluation of the reliability of his opinions for the time period prior to 1985, and that this was not a proper basis for excluding his opinions.

² The Rebers explain in their brief that damages from stray voltage do not occur simultaneously with the exposure. The preparation of testimony on damages from the period 1985-1988 would have required lengthy analysis and consultation with other experts that could not be accomplished in the middle of trial, even with a brief continuance.

Admission of an expert witness's opinion testimony is a matter of trial court discretion. *Brain v. Mann*, 129 Wis.2d 447, 458, 385 N.W.2d 227, 232 (Ct. App. 1986). A discretionary decision, to be sustained, must be based on the facts of record and the applicable law. *Id.* A trial court misuses its discretion if it misapplies or misinterprets the law. *Id.* The standards for admission of expert testimony in Wisconsin are explained by the supreme court in *State v. Walstad*, 119 Wis.2d 483, 351 N.W.2d 469 (1984), and, more recently, in *State v. Peters*, 192 Wis.2d 674, 534 N.W.2d 867 (Ct. App. 1995).

Thus, the rule remains in Wisconsin that the admissibility of scientific evidence is not conditioned upon its reliability. Rather, scientific evidence is admissible if: (1) it is relevant, § 904.01, STATS.;³ (2) the witness is qualified as an expert, § 907.02, STATS.;⁴ and (3) the evidence will assist the trier of fact, § 907.02, [citing *Walstad*] [footnotes added].

Moreover, scientific evidence is admissible under the relevancy test even regardless of the scientific principle that underlies the evidence. [Cite omitted.]
As our supreme court noted in *Walstad*:

The fundamental determination of admissibility comes at the time the witness is "qualified" as an expert. In a state such as Wisconsin, where

³ Section 904.01, STATS., provides:

"Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

⁴ Section 907.02, STATS., provides:

Testimony by experts. If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

substantially unlimited cross-examination is permitted, the underlying theory or principle on which admissibility is based can be attacked by cross-examination or by other types of impeachment. Whether a scientific witness whose testimony is relevant is believed is a question of credibility for the finder of fact, but it is clearly admissible. [Cite omitted.]

Peters, 192 Wis.2d at 687-88, 534 N.W.2d at 872.

We recognized in *Peters* that the trial court does have a "limited and indirect gatekeeping role" in reviewing the admissibility of scientific evidence. *Peters*, 192 Wis.2d at 688, 534 N.W.2d at 872. We noted a number of grounds on which a trial court might properly reject expert opinion testimony even if it is relevant: (1) the evidence is superfluous; (2) the evidence will involve a waste of judicial time and resources; (3) the probative value is outweighed by prejudice; (4) the jury is able to draw its own conclusions without it; (5) the evidence is inherently improbable; or (6) the subject is not suitable for expert testimony. *Id.* at 689, 534 N.W.2d at 873. We noted that this list was not exhaustive. *Id.* at 689-90, 534 N.W.2d at 873.

There is no dispute over the qualifications of Professor Szews to testify as an expert on stray voltage,⁵ nor is there any dispute that testimony on stray voltage levels on the Reber farm from 1978 to 1985 is relevant.

WP&L does not argue that any ground specifically listed in *Peters* for excluding relevant testimony of a qualified expert applies. Rather, WP&L

⁵ Professor Szews holds a Ph.D in electrical engineering and has taught various courses for many years in the electrical engineering curriculum at Marquette University. He has consulted in a little over 100 cases involving stray voltage and has done stray voltage investigations on 50 to 70 farms. He was appointed by the Wisconsin Secretary of Agriculture to a committee to investigate stray voltage and was on the original committee that set up a stray voltage task force and analysis team. He has testified at two hearings before the Wisconsin Public Service Commission held to determine the status of stray voltage in Wisconsin and to issue orders to power companies and others regarding stray voltage.

argues that an appropriate unlisted ground is lack of foundation for the expert's testimony. A trial court has the discretion to exclude expert testimony that lacks a foundation. *See, e.g., Schleiss v. State*, 71 Wis.2d 733, 746, 239 N.W.2d 68, 76 (1976) (affirming exclusion of psychiatrist's testimony on witness' mental state because psychiatrist relied solely on statements witness made to police, did not examine or interview witness and conceded that absolute diagnosis would require extensive interview and review of other material). The question here is whether the trial court's reason for excluding Professor Szews's testimony was an appropriate exercise of discretion because his testimony lacked foundation or was instead an inappropriate evaluation of the reliability of his testimony.

WP&L argues that § 907.05, STATS., is the controlling statute. Section 907.05 provides:

The expert may testify in terms of opinion or inference and give the reasons therefore without the prior disclosure of the underlying facts or data, unless the judge requires otherwise. The expert may in any event be required to disclose the underlying facts or data on cross-examination.

Section 907.05 is consistent with *Rabata v. Dohmer*, 45 Wis.2d 111, 172 N.W.2d 409 (1969), which eliminated the requirement that expert opinions be expressed only in response to a hypothetical question that contains all the material premises for the opinions elicited in the question. Although eliminating this requirement, the court in *Rabata* made clear the trial court still had the discretion to require that a hypothesis be used or to insist that some "foundation be put in the record if [the trial court] believes that the elicitation of the opinions without a foundation is likely to confuse or mislead the jury." *Id.* at 134-35, 172 N.W.2d at 420-21.

There is no question that the trial court could properly require Professor Szews to disclose the foundation for his opinion on stray voltage levels for the years prior to 1985. Professor Szews did that, in testimony before the jury and in more detail during voir dire.

In addition to his testimony about the sources of the facts and data he relied on, which we have already described,⁶ Professor Szews testified as follows concerning the new substation and other changes in WP&L's distribution system. He was aware, based on the discovery responses of WP&L, that the substation serving the Reber farm changed in 1985. The substation before 1985, the Vesper substation, was eleven miles from the farm while the Rudolph substation, was three miles from the Reber farm. Professor Szews explained that the closer location of the Rudolph substation would decrease the amount of stray voltage on the Reber farm contributed by WP&L's systems and he explained the reasons for that. He would expect a new substation to decrease the resistance to earth of the grounding mat and he explained the reason for that and the effect that would have on WP&L's electrical system and the cow contact voltage on the Reber farm. The new three-phase feeder built at the Rudolph substation in 1991 would lower stray voltage on the Reber farm compared to the old single phase conductor. Aside from the additional grounding and the improvement in connections on the wiring of WP&L's system, which WP&L made beginning in 1988, the distribution conductor Professor Szews personally observed was the same as that existing in 1988 and was the same as that in 1978. Professor Szews also explained that the most significant portion of the distribution system with respect to the contribution from WP&L's system to stray voltage on the Reber farm is the portion of the system closest to the farm, in particular, the one mile closest to the farm, and he explained the reasons for that.

In Professor Szews's opinion the information in his possession permitted him to draw an inference to a reasonable degree of engineering probability concerning whether the levels of stray voltage on the Reber farm were harmful to the health, productivity and behavior of the herd between 1978 and 1988. His opinion to a reasonable degree of engineering probability was

⁶ Section 907.03, STATS., provides:

The facts or data in the particular case on which an expert bases an opinion its inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inference upon the subject, the facts or data need not be admissible in evidence.

There is no contention by WP&L that the facts and data on which Professor Szews relied were not of the type reasonably relied on by experts in his field.

that stray voltage on the Reber system decreased with the building of the new substation.⁷

The trial court's reason for excluding Professor Szews's testimony was that, in the court's view, the new substation was a significant change in the distribution system, and there was no testing with the old substation and no knowledge of what else had changed besides the decrease in distance to the Reber farm. However, Professor Szews testified that he had the information he needed to determine, to the requisite degree of professional probability, the impact of the new substation. The court's comments indicate that it was questioning Professor Szews's opinion that he did have sufficient information. Exclusion of his testimony for this reason, once expertise and relevancy have been established, is not within the limited gatekeeping function described in *Peters*.

The trial court, in effect, determined that Professor Szews's opinions were not reliable because they were not based on sufficient information about the Vesper substation. However, this is not the proper role for the trial court. See *Brain*, 129 Wis.2d at 448, 462, 385 N.W.2d at 234 (trial court improperly excluded expert testimony on the ground that surveys expert relied on were not sufficiently detailed to permit expert's conclusions). It is the role of opposing counsel to bring out faulty or inadequate premises leading to an expert's conclusions. *Id.* at 462, 385 N.W.2d at 234. And it is for the fact-finder, in this case, the jury, to decide whether the opinions, after being challenged on cross-examination, are credible. *Id.*

WP&L cites *Kreyer v. Farmers' Co-operative Lumber Co.*, 18 Wis.2d 67, 117 N.W.2d 646 (1962), in support of its argument that the trial court properly excluded Professor Szews's testimony based on lack of foundation.

⁷ After voir dire, the Rebers made an offer of proof that, if permitted to testify further, Professor Szews would testify that to a reasonable degree of engineering probability, the Reber herd suffered from harmful levels of stray voltage between 1978 and 1988; that the source was the distribution system of WP&L; that the primary neutral current from that distribution system flowed into the Reber farm in unreasonable quantities during these years; that WP&L failed to provide reasonably adequate services to the Reber farm during those years; that WP&L was negligent in its provision of services and facilities to the Reber farm during those years; and that such negligence produced harmful levels of stray voltage on the Reber farm.

Kreyer was decided before *Rabata*, when hypothetical questions were still the only approved method for presenting certain types of expert opinions. *Id.* at 76, 117 N.W.2d at 651. In *Kreyer*, the appellant claimed the trial court erred in excluding his expert's opinion testimony on the cause of a fire. In sustaining the trial court's ruling on the ground that there was a lack of foundation for the expert's testimony, the court noted that when the expert was called to testify, there was not yet any testimony in the record indicating where the fire started. Testimony of certain burned areas observed after the fire "was introduced long after this [expert] witness took the stand and therefore could not be considered in any way as part of a proper foundation for the question." *Id.* at 81, 117 N.W.2d at 653-54.

Because *Kreyer* was concerned with whether there were facts in evidence at the time the expert testified to support his testimony--a requirement that no longer exists--we do not find it persuasive. The same is true of *Jacobson v. Greyhound Corp.*, 29 Wis.2d 55, 138 N.W.2d. 133 (1965), also relied on by WP&L. In *Jacobson*, the court sustained the trial court's exclusion of evidence, both because the subject of testimony was not a proper field for expert knowledge and because significant factors were not included in the hypothetical question. *Id.* at 63-64, 138 N.W.2d at 137.

WP&L also argues that the trial court's ruling comes within its authority to regulate a trial by limiting claims. According to WP&L, having to defend against a claim of damages due to stray voltage for years prior to 1985 places an unfair burden on WP&L. WP&L relies on *State v. Halverson*, 130 Wis.2d 300, 387 N.W.2d 124 (Ct. App. 1986), in which the trial court limited trial to twelve of 706 alleged violations of water pollution regulations and dismissed all the others with prejudice. We concluded it was not an erroneous exercise of the trial court's discretion to limit trial to twelve claims to avoid overwhelming the jury, but we also held that it *was* an erroneous exercise of discretion to prevent any trial of the rest of the claims by dismissing them with prejudice. *Id.* at 303-06, 387 N.W.2d at 126-27.

Halverson has no application to this case. *Halverson* certainly does not provide authority for a trial court to exclude otherwise admissible expert testimony. Moreover, WP&L never argued to the trial court that it would have difficulty defending against the Rebers' assertion, contained in their complaint, that damages occurred for years prior to 1985, and that was not the basis for the trial court's ruling.

WP&L discusses the reasons that Professor Szews's testimony for the years between 1978 and 1985 is not reliable, noting changes in the distribution system, including the substation, and in the Reber farm's electrical system. These are all proper bases for challenging Professor Szews's testimony on cross-examination but they are not proper bases for excluding his testimony. Because Professor Szews's testimony on stray voltage for the years prior to 1985 was central to the Rebers' proof of damages, the exclusion of that testimony prejudiced substantial rights of the Rebers. See § 805.18(2), STATS. They are entitled to a new trial on their negligence claim.

The second issue on this appeal is whether the trial court properly dismissed the nuisance claim before trial. At the time the trial court did so, the controlling case was *Vogel v. Grant-LaFayette Electric Cooperative*, 195 Wis.2d 198, 536 N.W.2d 140 (Ct. App. 1995), in which we held that nuisance claims are not available to plaintiffs in stray voltage cases. Our decision in *Vogel* has since been reversed. *Vogel v. Grant-LaFayette Electric Cooperative*, 201 Wis.2d 416, 548 N.W. 2d 829 (1996). The supreme court has decided that nuisance law is applicable to stray voltage claims because excessive levels of stray voltage may invade a person's private use and enjoyment of land. *Id.* at 427, 548 N.W.2d at 834. On remand for a new trial on the negligence claim, the court should reinstate the nuisance claim and proceed on that claim consistent with the supreme court's opinion in *Vogel*.

By the Court.—Judgment reversed.

Not recommended for publication in the official reports.